UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

LARRY GENE HEGGEM, Plaintiff, vs. BRANDON KELLY and JEFF UTTECHT, Defendants.	No. CV-07-258-LRS **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION, *INTER ALIA***

BEFORE THE COURT is the Plaintiff's Motion To Alter Or Amend Judgment (Ct. Rec. 113). This motion is heard without oral argument.

I. BACKGROUND

On June 20, 2008, this court entered an "Order Granting Defendants' Motion For Summary Judgment, In Part, *Inter Alia*," (Ct. Rec. 106), which denied summary judgment as to Defendant Kelly, but granted summary judgment as to Defendant Uttecht, WSP Superintendent. This court found as a matter of law that Uttecht did not "personally participate" in the alleged excessive force perpetrated by Kelly on the Plaintiff on April 12, 2007, and that Uttecht did not fail to protect the Plaintiff by allowing Kelly to escort the Plaintiff on two occasions after the April 12, 2007 incident. Therefore, Defendant Uttecht was awarded judgment on the Eighth Amendment claims asserted against him by the Plaintiff. Plaintiff now seeks reconsideration of the court's finding that Uttecht did not fail to protect him.

II. DISCUSSION

A motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) is commonly known as a motion for reconsideration. " '[T]he major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Pyramid Lake Paiute Tribe v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 790); see *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985); see also *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982) (reconsideration available "to correct manifest errors of law or fact or to present newly discovered evidence"). Such motions are not the proper vehicle for offering evidence or theories of law that were available to the party at the time of the initial ruling. *Fay Corp. v. Bat Holdings I, Inc.*, 651 F. Supp. 307, 309 (W.D. Wash. 1987); see *Keene Corp.*, 561 F. Supp. at 665-66.

Having reviewed the reasoning found at pp. 13-15 of its summary judgment order (Ct. Rec. 106), and having considered the Plaintiff's arguments for reconsideration, the court finds it did not commit a "clear error" in concluding as a matter of law that Uttecht did not fail to protect the Plaintiff. As the court discussed in its order, the video of the incident is inconclusive as to whether Kelly's use of force was excessive. Accordingly, Kelly could not have inferred from the video that Kelly presented a substantial risk of serious harm to the Plaintiff if he continued to escort the Plaintiff. Kelly escorted the Plaintiff on at least two occasions following the April 12, 2007 incident and the Plaintiff was not harmed. The fact that Plaintiff suffered some injury during the April 12 incident, while relevant to the excessive force inquiry, would not have necessarily led Uttecht to infer that the use of force had actually been excessive and that Kelly thereafter posed a substantial risk of serious harm to the Plaintiff.

Plaintiff says he intends to submit to the court a video of a similar incident involving another inmate in which the inmate also pulled on the retainer rope while inside his cell, but in this instance, the escort officers did not pull on the rope, but maintained a firm hold on the rope and verbally instructed the inmate not to pull on the rope. As the court pointed out in its summary judgment order, while DOC policy states verbal intervention "should" occur before the use of physical force, it is not mandated because it is recognized that there are circumstances where such verbal intervention is not possible or practical. (Ct. Rec. 120 at pp. 8-9, n. 8). Whether the use of physical force is "excessive," is a fact sensitive inquiry. Maintaining a firm hold on the rope may be the appropriate response in some instances, but something more may be required in other instances to insure that the rope is not lost and then can be used by the inmate to injure himself and/or others. In sum, even if this video in fact depicts what Plaintiff says it depicts, it would not change the court's summary judgment determinations (that there is an issue of material fact whether Kelly used excessive force, and that there is no issue of material fact that Uttecht did not fail to protect Plaintiff from harm).[1]

The court reiterates that its summary judgment determinations are not inconsistent. That a jury may view the videotape of April 12, 2007 incident and, along with consideration of other evidence, conclude there was excessive force, does not mean Uttecht should have concluded there was excessive force and therefore inferred that Kelly thereafter posed a substantial risk of serious harm to Plaintiff.

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[1] Plaintiff's "Request For Court Permission To Submit Newly Obtained Evidence" (Ct. Rec. 112) is **DENIED** at this time without prejudice to Plaintiff seeking to have the video considered at trial. Its relevance to the excessive force inquiry, and its probative value versus prejudicial effect, will be considered at that juncture.

III. CONCLUSION

Plaintiff's Motion To Alter Or Amend Judgment (Ct. Rec. 113) is **DENIED**.

IT IS SO ORDERED. The District Executive shall forward copies of this order to the Plaintiff, to counsel for the Defendants, and to Magistrate Judge Hutton.

DATED this 1st of August, 2008.

s/Lonny R. Suko

LONNY R. SUKO
United States District Judge